U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0395 and
17-0395A

JESSE FRANKLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREYSTAR CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION c/o COASTAL RISK SERVICES	)	DATE ISSUED: Feb. 28, 2018
	)	
Employer/Carrier-Petitioner Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

David L. Bateman (Bateman Law Firm), Baton Rouge, Louisiana, for claimant.

Thomas J. Smith and Kathleen K. Charvet (Galloway Johnson Tompkins Burr & Smith), Houston, Texas, for employer/carrier.

Kathleen H. Kim (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order (2014-LHC-00980) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the OCSLA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, who has a history of treatment for back pain,[1] felt intense pain in his back and tingling/numbness down his legs approximately 15 minutes after completing a task in his capacity as a production mechanic for employer on June 10, 2013.[2] Claimant immediately reported the incident, was examined by a medic, and thereafter evacuated to the mainland. Dr. Davis diagnosed low back pain, probably due to exacerbation of pre-existing lumbar disc pathology. Dr. Davis declared claimant "unfit for duty." EX 33. Claimant subsequently saw his treating neurosurgeon, Dr. Vardiman, who diagnosed lumbar-thoracic radiculopathy, as well as pre-existing degenerative joint disease and lumbar spondylosis with myelopathy.[3] On September 23, 2013, Dr. Vardiman performed a complete discectomy and three level (L4-S1) fusion.

Claimant, who has not worked since the June 10, 2013 work incident, filed a claim

[1]Claimant has received treatment for back pain since first injuring his neck and back as a high school football player in 1999. Claimant obtained treatment in 2004 and from 2009-2012, culminating with a "minimally invasive surgical procedure" at L4-L5, which was performed by Dr. Vardiman, a neurosurgeon, on August 24, 2012.

[2]Claimant was installing a pipeline pump motor on the ATP *Titan*, a floating production platform in the Gulf of Mexico. He stated that the pain commenced within minutes of trying to push a 5,000 pound motor into position with his right leg.

[3]Claimant also received treatment for back pain, between July 27, 2009 and November 5, 2013, from Drs. Robbins and Monis at the Anesthesia Pain Management clinic, consisting of prescription medication and steroid injections. EXs 42, 34.

seeking benefits for his allegedly work-related lumbar condition. Employer controverted the claim, and filed for Section 8(f) relief, 33 U.S.C. §908(f). In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his disabling back condition is related to the employment incident, which employer did not rebut. Alternatively, based on the record evidence as a whole, the administrative law judge found claimant established, by a preponderance of the evidence, that his disabling back condition is related to the work incident. The administrative law judge found claimant's condition has not reached maximum medical improvement and claimant has not been released to work. Thus, he awarded claimant ongoing temporary total disability benefits from June 10, 2013, as well as medical benefits. 33 U.S.C. §§907, 908(b). The administrative law judge denied employer's request for Section 8(f) relief as premature because claimant's condition has not yet reached maximum medical improvement. Nevertheless, the administrative law judge concluded that "in the event" claimant is later found permanently totally disabled, employer has met the prerequisites for entitlement to Section 8(f) relief.

On appeal, employer challenges the administrative law judge's findings that it did not rebut the Section 20(a) presumption, that claimant's condition has not reached maximum medical improvement, and, thus, that it is not entitled to Section 8(f) relief. BRB No. 17-0395. Claimant responds, urging affirmance of the administrative law judge's decision. In a consolidated brief, the Director responds, urging affirmance of the administrative law judge's finding that claimant has not reached maximum medical improvement, as well as his denial of Section 8(f) relief as premature, and, in support of his cross-appeal, contends the administrative law judge erred by finding employer potentially entitled to Section 8(f) relief at some future time. BRB No. 17-0395A.

With respect to the administrative law judge's finding that employer did not rebut the Section 20(a) presumption, employer contends the opinions of Drs. Cenac and Robbins, as well as a comparison of claimant's lumbar MRIs conducted on April 9, 2012 and June 14, 2013, which reveal "little significant change," establish that there was no change in claimant's underlying condition due to the June 10, 2013 injury. Employer thus avers that any changes in claimant's chronic lumbar condition subsequent to the June 2013 work incident are due solely to the natural progression of, rather than any work-related aggravation to, his underlying condition.

Once the claimant establishes a prima facie case, as here, Section 20(a) of the Act applies to relate his injury to his employment incident, and the burden shifts to the employer to rebut the presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Substantial evidence is "that relevant evidence -- more than a scintilla but less than a preponderance -- that would cause a reasonable person to accept the fact-finding." *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 228, 46

BRBS 25, 27(CRT) (5th Cir. 2012).[4] The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Id.*, 683 F.3d at 231, 46 BRBS at 28-29(CRT); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that the work event neither directly caused the injury nor aggravated a pre-existing condition to result in injury. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the employer rebuts the presumption, it no longer controls, and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found the opinions of Drs. Cenac and Robbins insufficient to rebut the Section 20(a) presumption because neither physician opined that claimant's work accident did not aggravate his underlying back condition.[5] Dr. Cenac largely tied claimant's long-standing multi-level progressive degenerative pathology and segmental instability at L4-5 and L5-S1 to his obesity and added that those conditions are "continuously aggravated by his obesity and activities of daily living." EX 28 at 2. Nevertheless, Dr. Cenac stated that claimant's underlying condition was "accelerated and exacerbated by his work life experience," and that "more probably than not" claimant's current disability is a result of the combination of the June 10, 2013 work injury and the pre-existing condition. *Id.* Dr. Robbins noted an increase in claimant's symptomology following the work accident and opined that, given claimant's history and MRIs, the June 10, 2013 accident could have caused a worsening or aggravation of claimant's condition.

[4]In *Plaisance*, the Fifth Circuit, within whose jurisdiction this case arises, stated that, in order to rebut the Section 20(a) presumption, an employer must "advance evidence to throw factual doubt on the prima facie case." *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

[5]The administrative law judge also found the opinions of Drs. Geibel and Davis insufficient to rebut the Section 20(a) presumption because each acknowledged that claimant's June 10, 2013 work incident could have aggravated his underlying lumbar condition. Specifically, the administrative law judge found Dr. Geibel stated that "certainly" the June 2013 work incident "could have fast-forwarded" claimant's underlying degenerative back condition to the point where he needed additional surgery, ALJX 2, and Dr. Davis opined, at the time of the accident, that claimant "had a flare-up of back pain" as a result of the incident at work. EX 33, Dep. at 55.

EX 42 at 36-37, 44-48. The administrative law judge thus found that employer did not introduce substantial medical or other evidence that claimant's back condition was not caused, at least in part, by the June 10, 2013 work incident. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). We affirm the administrative law judge's finding that the opinions of Drs. Cenac and Robbins do not constitute substantial evidence of the absence of a relationship between the work accident and claimant's disabling condition because they conceded at least some aggravation of claimant's underlying condition due to the work accident.[6] *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

Moreover, the administrative law judge rationally rejected employer's contention that claimant, at most, sustained only a temporary aggravation of his pre-existing lumbar condition as a result of the June 10, 2013 work incident. Decision and Order at 97. In reaching this conclusion, the administrative law judge relied on Dr. Miller's opinion that if claimant had merely suffered a transient strain, the 2013 lumbar fusion would likely not have been necessary. EX 32 at 24. He also relied on Dr. Vardiman's belief that the work incident likely precipitated the progression of claimant's current symptoms, EX 35 at 111-15, as well as Dr. Geibel's opinion that the 2013 surgery was likely related to the work incident and that claimant's present adjacent level disease is, in turn, a consequence of that surgical procedure. ALJX 2. The administrative law judge accorded diminished weight to Dr. Davis's opinion that claimant's injury was merely a temporary exacerbation of his pre-existing condition, because while Dr. Davis confirmed that degenerative disc disease can worsen over time "just with the activities of daily living," *see* EX 33 at 35-37, he did not explain why claimant's work accident could not have similarly worsened or accelerated his underlying degenerative disc disease. Decision and Order at 98. The administrative law judge was similarly unconvinced by Dr. Cenac's opinion that claimant's disability is not due to his employment injury because of the inconsistencies in Dr. Cenac's reports and testimony.[7] *Id.* The administrative law judge is entitled to weigh the evidence; here, he rationally rejected employer's contention that claimant sustained, at best, only a temporary aggravation of his underlying condition as a result of the June 10, 2013 work incident. Substantial evidence supports his finding that claimant's

[6]Contrary to employer's contention, the similarity of the pre- and post-accident MRIs is not dispositive of the rebuttal inquiry in this case given that the physicians conceded some aggravation of claimant's physical symptoms.

[7]Dr. Cenac stated that claimant's present subjective complaints were due entirely to a continuation of his pre-existing condition, but also stated that claimant's underlying condition was "accelerated and exacerbated by his work life experience, physical labor, and weight," and that claimant's current disability is a result of a combination of his pre-existing condition and the June 10, 2013 work incident. EX 36, Dep. at 15-17; EX 28.

disabling back condition is due at least in part to the work incident. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 193, 33 BRBS 65, 67(CRT) (5th Cir. 1999) ("The only legally relevant question is whether the [work] injury is *a cause* of th[e] disability.") (emphasis in original); *see generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Therefore, we affirm the administrative law judge's finding that claimant's disabling back condition is work-related.

Employer next contends the administrative law judge erred by finding that claimant's condition has not yet reached maximum medical improvement. A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, or when the medical evidence establishes it reached maximum medical improvement. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If, however, a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *See Gulf Best Electric v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

The administrative law judge credited the opinions of Drs. Vardiman, Miller and Geibel, over that of Dr. Cenac regarding the nature of claimant's disability. Drs. Vardiman, Miller and Geibel each opined that claimant's condition was not yet at maximum medical improvement as he would benefit from further treatment of his back condition.[8] *Methe*, 396 F.3d 601, 38 BRBS 99(CRT). In contrast, the administrative law

[8]In August 2015, Dr. Vardiman stated "I don't think [claimant] has reached maximum medical improvement," because while claimant is "clearly making progress" and "headway" with regard to his lumbar spine condition, he continues to have "lots of diffuse aches and pains," and "I would hope he can improve beyond where he is now to some degree." EX 35, Dep. at 94-95. In August 2015, Dr. Miller stated that claimant is not at maximum medical improvement because there remains more that claimant can do to assist with his condition, e.g., lose weight, get physically fit, strengthen his spine, and perhaps have another procedure to help with his pain. EX 32, Dep. at 27, 40. Moreover, in October 2016, Dr. Geibel, a physician appointed by the Department of Labor, stated claimant was not at maximum medical improvement, and he recommended continued care, treatment and further evaluation of claimant's adjacent spinal disc level disease, which Dr. Geibel determined was a direct consequence of the 2013 work-related surgery. ALJX 2; EX 47, Dep. at 53.

judge found Dr. Cenac's opinion "unreliable" and not "particularly convincing," Decision and Order at 91, 92, 93, 99, due to his not having actually examined claimant, his failure to explain why claimant's physical job for employer did not accelerate or exacerbate his pre-existing condition, and inconsistent statements regarding the cause of claimant's present condition. The administrative law judge rationally credited the opinions of Drs. Vardiman, Miller and Geibel over the contrary, and internally inconsistent, opinion proffered by Dr. Cenac. As the administrative law judge's finding that claimant's condition is not at maximum medical improvement is supported by substantial evidence, it is affirmed. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). Accordingly, we affirm the administrative law judge's finding that claimant is entitled to ongoing temporary total disability benefits.

Employer contends the administrative law judge erred in finding that resolution of Section 8(f) relief "is premature at this time" because the administrative law judge alternatively found that employer satisfied all of the pre-requisites necessary for entitlement to Section 8(f) relief under the Act in the total disability case. The Director, in his cross-appeal, contends the administrative law judge erred by addressing Section 8(f) liability before claimant's disability became permanent. The Director thus requests that the Board vacate all language in the decision pertaining to Section 8(f) aside from "Section 8(f) is premature at this time and is therefore DENIED." Decision and Order at 103-104.

Section 8(f) of the Act unequivocally limits the Special Fund's liability only to payments of benefits for permanent disability. 33 U.S.C. §908(f)(1); *see Pacific Ship Repair & Fabrication Inc. v. Director, OWCP* [*Benge*], 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012); *Sizemore v. Seal Co.*, 23 BRBS 101 (1989); *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183 (1985). The Board has held that it is error for the administrative law judge to address the elements of Section 8(f) where the claimant has been found to be only temporarily disabled. *See Jenkins*, 17 BRBS 183; *Nathenas v. Shrimpboat, Inc.*, 13 BRBS 34 (1981)*; Laput v. Blakeslee, Arpaia, Chapman, Inc.*, 11 BRBS 363 (1979). Consequently, as the administrative law judge did not award any permanent disability benefits, the issue of Section 8(f) relief is not ripe for adjudication. We, therefore, affirm the administrative law judge's denial of Section 8(f) relief on the ground that the issue is premature. We strike the administrative law judge's discussion of the evidence in terms of the elements for establishing Section 8(f) relief, Decision and Order 104-109, as well as his resulting conclusions regarding employer's entitlement to Section 8(f) relief.[9] *Jenkins*, 17 BRBS 183.

[9]If any party moves to modify the nature of claimant's award of benefits from temporary to permanent, then employer may raise Section 8(f). 33 U.S.C. §922; *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994); *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988); *see also* 33 U.S.C. §908(f)(3).

Accordingly, we modify the administrative law judge's Decision and Order to strike his discussion of the merits of employer's claim for Section 8(f) relief, as well as his conclusions regarding employer's potential future entitlement thereto. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge